COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1287

COMMONWEALTH

vs.

GREGORY J. WILLIAMS.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This is the Commonwealth's interlocutory appeal from a suppression order by a judge of the District Court. We vacate the order and remand the case to the District Court for consideration of the defendant's request for a hearing under Franks v. Delaware, 438 U.S. 154 (1978) (Franks hearing).

1. Background. A. Search warrant affidavit. On April 17, 2017, the Holyoke police department applied for a warrant to search 171 Lincoln Street. In the accompanying affidavit, a detective averred the following. On the day of the application, the police department, responding to a report that a man was stumbling around in the driveway of 171 Lincoln Street, dispatched an officer there. Shortly after noon, the officer found a man standing in the driveway, but slumped over. The man identified himself as Eddie Noel Santiago. The officer asked

Santiago if he was all right. Santiago said, "[Y]a that dude just gave me a Xanax."

A motorcycle, helmet, gloves, and sunglasses were scattered about the driveway. Blood was coming from Santiago's nose. Pointing out the blood, the officer again asked Santiago if he was all right.

The officer then noticed a handgun protruding from Santiago's right front pants pocket. He handcuffed Santiago, secured the gun, and radioed for more officers. The officer found that Santiago was also carrying a large amount of cash, several bundles of heroin, and ammunition.

A police sergeant and a detective (who later signed the affidavit) arrived. After the detective advised Santiago of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), Santiago agreed to talk.

Santiago told the detective the following. Santiago said he was there to see Greg Williams (the defendant), and gestured toward the defendant who was standing on the steps at the rear of 171 Lincoln Street. Santiago said he had been inside 171 Lincoln Street, where he saw more than fifteen marijuana plants growing in the basement. Santiago said the defendant told him that he had more than sixteen plants. Santiago said the defendant showed him, and allowed him to handle, an AK-47 assault rifle (which Santiago described in detail to the

detective). Santiago said the defendant told him he also had three handguns, but Santiago did not see them.

Around the same time, the police sergeant overheard a cell phone conversation between the defendant and a person whom the defendant identified as his son. The defendant said, "[T]his is gonna fuck things up." The sergeant believed the defendant was referring to an illegal drug operation.

The police arrested Santiago, and the detective later interviewed Santiago in the police station's lockup. Santiago said he went to 171 Lincoln Street to show the defendant the gun that he had been caught carrying, and had planned to sell the gun to the defendant if he liked it. Santiago repeated that the defendant had given him Xanax.

The defendant did not have a firearm identification card (FID) or a license to carry a firearm (LTC). No one at that address had an active FID or LTC.

At approximately 3:22 P.M., the sergeant and a second detective looked in a trash bag "on the tree belt in front of 171 Lincoln Street."[1] They found a red plastic cup that contained an open alcohol wipe and used heroin packaging that held a powder residue they believed was heroin. They also found

[1] The tree belt is the area between the sidewalk and street. See, e.g., Gallitano v. Board of Survey & Planning of Waltham, 10 Mass. App. Ct. 269, 272 n.1 (1980).

"an additional large amount of heroin packaging with residue" in the trash bag. A letter in the trash bag was addressed to the Williams household at 171 Lincoln Street.[2]

The detective who signed the affidavit opined that "probable cause has been established . . . that a marijuana grow[ing operation], more than [fifteen] marijuana plants, heroin[,] and at least [one] firearm are secreted inside 171 Lincoln Street."

B. Search warrant. On the same day, a warrant issued to search 171 Lincoln Street for heroin, Xanax, products and evidence of heroin manufacture and trade, assets derived from such trade, firearms and ammunition (including an AK-47 assault rifle, brown with black metal parts), and other documents and items.[3]

C. Search. Later that day, police executed the warrant and searched 171 Lincoln Street. They seized two Oxycodone pills, heroin packets, Suboxone strips, unidentified pills and liquid, nineteen living and two dead marijuana plants, "bong" pipes, drug ledgers, shotgun shells, and other items.

---

[2] The defendant has not challenged the seizure of this trash. See California v. Greenwood, 486 U.S. 35, 40-41 (1988) (person has no expectation of privacy in garbage left near curb); Commonwealth v. Pratt, 407 Mass. 647, 660 (1990) (same).

[3] Curiously, the search warrant did not mention marijuana or the marijuana growing operation.

D. Motion to suppress. In his motion to suppress the evidence seized during the search, the defendant also requested a Franks hearing, alleging that the detective-affiant knowingly, intentionally, or recklessly misstated or withheld information from the magistrate, especially about Santiago. A District Court judge granted the defendant's motion to suppress the evidence on another basis, writing that the

> "[a]ffidavit in support of [the] search warrant d[id] not satisfy the Aguilar-Spinelli test where the information received by the affiant came from an arrestee with no circumstances which would lead the affiant to believe that his source was credible or reliable. Based on the Court's findings herein, the defendant's motion for a Franks hearing is moot."[4]

2. Discussion. We review de novo whether probable cause existed to issue the search warrant. Commonwealth v. Perkins, 478 Mass. 97, 102 (2017). In applying for a search warrant, police must meet the two-pronged Aguilar-Spinelli test by establishing the informant's (1) "basis of knowledge" and (2) "veracity." Commonwealth v. Upton, 394 Mass. 363, 374-375 (1985), citing Aguilar v. Texas, 378 U.S. 108, 114 (1964); Spinelli v. United States, 393 U.S. 410, 415 (1969).

---

[4] Attached to the combined motion were police reports and other documents to support the request for a Franks hearing. One police report stated that the defendant was the person who had called the police. Other documents related to Santiago's criminal record. We do not consider the facts in the attachments, as our inquiry is confined to the facts in the four corners of the affidavit. See Commonwealth v. Robertson, 480 Mass. 383, 386 (2018).

The second prong is at issue here,[5] and we conclude that three factors establish Santiago's veracity. Police identified Santiago, the informant, by name in the affidavit. See Commonwealth v. Atchue, 393 Mass. 343, 347 (1984). Santiago accurately identified the defendant by name, gesturing at him from the driveway while the defendant stood on nearby steps. Finally, by telling the police while under arrest that he had hoped to sell the gun to the defendant, Santiago made what the magistrate was free to consider a statement against penal interest. See Commonwealth v. Spano, 414 Mass. 178, 182-183, 186 (1993); Commonwealth v. Melendez, 407 Mass. 53, 56 (1990) ("In order for a statement to be considered by the magistrate to be a statement against penal interest, there must be information in the affidavit which tends to show that the informant would have had a reasonable fear of prosecution at the time that he made the statement"). See also Commonwealth v. Kaupp, 453 Mass. 102, 111 (2009) (affidavit should be viewed as a whole and not subjected to hypercritical analysis). In determining whether a statement is against the informant's penal interest, we must view all the facts and circumstances together. See Melendez, supra. While Santiago's statement could be taken as an attempt

[5] The first prong, the basis of Santiago's knowledge, is not at issue, as he told police that he had been inside the defendant's home.

to deflect the attention of law enforcement away from him, it still amounts to a confession, while in police custody, to an attempted additional crime. Accordingly, although it is a very close question, we think Santiago's statement, taken with the other two factors, does suffice to support a finding of probable cause.[6]

Because the three factors established probable cause for the search warrant to issue,[7] we need not consider whether the evidence seized from the trash outside 171 Lincoln Street bolstered probable cause.

3. Conclusion. For the reasons stated, the judge erred in allowing the motion to suppress on the basis that probable cause was lacking. The order of suppression is vacated and the case is remanded for consideration of the defendant's request for a

[6] Of course, we express no opinion on whether that finding would have been proper had the magistrate been apprised of all the evidence known to the police that did not appear within the four corners of the affidavit (including, inter alia, the alleged fact that the defendant was the one who called the police to have Santiago removed from his property), which is part of what must be considered in the Franks hearing on remand. To be sure, Santiago had been caught red-handed with an unlawful firearm in his pocket, as well as eighty-eight packets of heroin (obviously an amount consistent with an intent to distribute), and almost $3,000 in cash.

[7] The defendant's vague cell phone conversation ("this is gonna fuck things up") did not corroborate Santiago's information, despite the sergeant's belief that the defendant was referring to a drug operation.

Franks hearing, which is no longer moot.

So ordered.

By the Court (Rubin,
Desmond & Ditkoff, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: August 12, 2019.

[8] The panelists are listed in order of seniority.